be grossed up in compiling his tax returns, the grossed-up figure being that on which his tax is assessed. Such is the object and purpose of the sub-section, not to create a debt when none in fact exists. I am therefore of opinion that the claim of the Government under sub-section (6) cannot be sustained.

Whether I am right or wrong in my decision on the grounds above-stated, it also seems to me that, under sub-section (3) "the tax which has been deducted from all dividends paid to shareholders during such year of assessment" should be compared with "the amount of the tax payable by the company in respect of such year of assessment." The tax payable by the appellants in 1956 was $14,722 and not $22,515; the larger sum was the amount payable by them in 1957. The tax paid by the appellants for the year of assessment 1956 was $14,722. In expressing my own view on this point, I would say, with the greatest respect for views to the contrary, that I think the amount of tax deducted and paid during any year of assessment should be compared only with the tax payable in the same year of assessment, and not with that of a different year, which was the year subsequent in the instant case. On the figures of tax payable and the tax paid for the year of assessment 1956, there was clearly no debt due under sub-section (4).

I have also had the advantage of reading the judgment of Hill J.A. while in course of preparing my own, and with his opinion and the reasons given I respectfully express my concurrence and also with the order proposed.

Appeal allowed.

Solicitors: *Das & Co.; Rodyk & Davidson.*

LEE CHONG v. TAN KWEE LOW & ANOR.

[C. A. (Thomson C.J., Hill J.A. and Rigby J.) December 14, 1960]

[J.B. — F.M. Civil Appeal No. 32 of 1960]

Negligence — Agency — Bailment — Negligent driving of motor vehicle — Whether owner liable.

The 1st defendant, the owner of a car, allowed his brother-in-law to borrow his car with the knowledge that the car was to be lent to the 2nd defendant for use for a period of 10 days. Whilst the 2nd defendant was driving the car, some days later, he was involved in a collision with the plaintiff. The 2nd defendant was not covered by any third party risks insurance, and the plaintiff was therefore left to recover such damages as he might by suing the defendants.

On the evidence before him the learned trial Judge held that the transaction between the parties was not a bailment of the car by the 1st defendant to his brother-in-law for use by the 2nd defendant. He held that at the time of the accident the 2nd defendant was driving the car as the agent, whether express or implied, of the 1st defendant, and accordingly the 1st defendant was liable to the plaintiff. On appeal,

Held: the 1st defendant had parted with his car unconditionally, retaining neither control nor the right to exercise any control over it. It was a clear instance of bailment and accordingly the 1st defendant was not responsible for the negligence of the 2nd defendant.

Per Rigby J.: "In all these cases where injury was caused to the person or property of a third party as the result of the negligent driving of a motor-car driven by a person other than the owner, vicarious liability was held to attach to the owner only by reason of the fact that he was physically present in the car at the time and, therefore, deemed to retain the right of dominion and control, (see *Samson* v. *Aitchison* (6) and *Pratt* v. *Patrick* (9)), or that he retained control through his servant who was present in the car (see *Reichardt* v. *Shard* (7) and *The Trust Co. Ltd.* v. *De Silva* (10)), or that the car was being driven by the person at the request of the owner in pursuance of what Du Parcq L.J. in *Hewitt* v. *Bonvin* (4) described, and Devlin J. in *Ormrod & Anor.* v. *Crosville Motor Services Ltd.* (5) adopted, as 'a social and moral obligation to drive the car'. In the case under consideration in this appeal there was no evidence that the 1st defendant had in any way reserved the right of control over the motor vehicle to himself or that the 2nd defendant was acting as his servant or agent."

Judgment of Neal J. reported in [1960] M.L.J. 212 reversed.

Cases referred to:—

(1) *Turbervil* v. *Stamp* (1697) Comb. 459.
(2) *Barnard* v. *Sully* 47 T.L.R. 557.
(3) *Britt* v. *Galmove and Nevill* 44 T.L.R. 294.
(4) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.
(5) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753.
(6) *Samson* v. *Aitchison* [1912] A.C. 844 at p. 850.
(7) *Reichardt* v. *Shard* (1941) 31, T.L.R. 24.
(8) *Du Cros* v. *Lambourne* [1907] 1 K.B. 40.
(9) *Pratt* v. *Patrick* [1924] 1 K.B. 488.
(10) *The Trust Co. Ltd.* v. *De Silva* [1956] 1 W.L.R. 376.
(11) *Parker* v. *Miller* 42, T.L.R. 408.
(12) *Raja Singh* v. *Chin Fatt* [1936] M.L.J. 157.
(13) *Monk* v. *Warbey & Ors.* [1935] 1 K.B. 75.

COURT OF APPEAL.

P. P. Dharmananda for the appellant.

L. A. J. Smith for the 1st respondent.

2nd respondent absent.

Thomson C.J.: I have had the benefit of reading the judgment of Rigby J. in this case with which I am in entire agreement.

I wish to add only a very few words of my own.

As is pointed out by the late Professor Holdsworth in his "History of English Law" (volume VIII p. 474) "the foundation of the modern law" relating to the vicarious liability of a master or principal for the torts of his servant or agent is to be found in a series of judgments of Holt C.J. towards the end of the 17th century. To this day what is probably the most helpful and compendious statement of the law on the point is to be found in the case of *Turbervil* v. *Stamp*(1) :—

"If my servant doth any thing prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business."

In view of the nature of some of the arguments which have been addressed to us in the present case I hasten to add that in my view this statement is equally true if the word "agent" be substituted for the word "servant". The important words are "being about my business."

The real difficulty, of course, is not in stating the law. The difficulty lies in the application of the law to the facts of any individual case.

It is true as was pointed out by Scrutton L.J. in the case of *Barnard* v. *Sully*[2] that the proof of ownership of a motor vehicle that has been driven negligently is some evidence to show that the driver was the servant or agent of the owner. The presumption, however, is not very helpful for it is one which can be rebutted by proof of the actual facts.

An example, however, of the application of the law to facts which are essentially the same as those of the present case is to be found in the case of *Britt* v. *Galmove and Nevill*[3]. In that case Nevill happened to be employed by Galmove but that was purely accidental. Galmove lent his car to Nevill to use outside business hours for Nevill's own purposes and Nevill drove it negligently and thereby caused damage to Britt. It was held that Galmove was not liable. "The journey" said Shearman J. "was not on the master's business. The master was for the nonce a stranger."

Hill J.A. (delivered by Ismail Khan J.): I have read the judgment which my learned brother Rigby J. proposes to deliver and with which I entirely agree. He has dealt very fully with the matter and I feel it is only necessary for me to refer briefly to one aspect of the case.

The learned trial Judge held that the evidence established agency between the two defendants and the appeal was against that finding of fact and law.

The decisions in *Hewitt* v. *Bonvin*[4] and *Ormrod* v. *Crosville Motor Services Ltd.*[5] bear directly on the circumstances of the present case and should in my opinion clearly have been applied to it by Neal J. These two cases were considered by him, but it seems obvious that the latter case was misread by him as will appear from the following passage from his judgment :—

> "On the question whether the 1st defendant is liable to the plaintiff for the negligence of the 2nd defendant, the position is far from clear. In support of the contention of the 1st defendant, there is the authority of dicta of MacKinnon L.J., in *Hewitt's case, supra*, and to support the plaintiff there are authorities culminating in *Ormrod's case, supra*. *Hewitt's case* has for years occasioned me personally some concern as to the extent to which it is authority. If it be authority, as contended in this case, for the statement that the owner of the motor-car is not liable for the negligence of his driver unless it is during the course of employment, or the driver is driving the vehicle on some business in connection with which the owner has an interest, then it is clear that, carried to its logical conclusion, the judgment in *Ormrod's case* should have been the opposite to what it was, because it is clear from the facts of that case that at the time of the accident occurring through the negligence of the driver he had ceased to be driving in the interests of the owner of the motor vehicle. It is perhaps unfortunate that in *Ormrod's case* the views of their Lordships on *Hewitt's case* were not clearly stated."

The portion of this passage which I have underlined is a misstatement of the facts in *Ormrod's case* and obviously resulted in the learned trial Judge thinking that the two authorities were divergent and needed reconciliation.

In the present case the owner had parted with his car unconditionally and he retained neither control nor the right to exercise any control over it. It was a clear instance of bailment and it follows that he was not responsible to a third party for the negligence or wrongful act of the bailee.

I considered that the respondent's action against the appellant should have been dismissed and I agreed that the appeal should be allowed.

Rigby J.: This was an appeal from a judgment of Neal J. sitting in the High Court at Johore Bahru, in which he awarded damages to the 1st respondent for personal injuries sustained by him as the result of the negligent driving of a motor car driven by the 2nd respondent to this appeal and owned by the present appellant. It will, I think, be convenient if I refer to the parties in the manner in which they appeared for the purpose of the proceedings in the trial Court, namely, the appellant as the 1st defendant, the 1st respondent as the plaintiff, and the 2nd respondent, the driver of the motor-car, as the 2nd defendant. The learned trial Judge awarded damages in favour of the plaintiff against both the defendants both jointly and severally on the ground that at the material time the 2nd defendant was driving the car as the agent of the 1st defendant and, as such, the 1st defendant was responsible in law for the negligent driving of the 2nd defendant. The 1st defendant appealed against that decision. The appeal turned solely on the issue as to whether or not the 2nd defendant was driving the car as the agent for the 1st defendant at the time the accident occurred. At the conclusion of the arguments before us on the hearing of this appeal we unanimously held that the decision of the learned trial Judge must be set aside and the appeal allowed with costs, both here and in the Court below. We intimated that we would give our reasons at a later stage in considered judgments.

The brief facts of the case were that the 1st defendant was approached by his brother-in-law, who requested him to lend his, the 1st defendant's, car to a friend of the brother-in-law for a period of 10 days. The 1st defendant agreed to do so. He did not know the person to whom the car was to be lent. He said he had a third party policy of insurance in force at the time. In cross-examination he said that at the time of lending the car to his brother-in-law he pointed out to him the third party policy of insurance in the car. The brother-in-law took away the car and lent it to his friend, the 2nd defendant. Some 8 days later whilst the 2nd defendant was driving the car an accident occurred which gave rise to these proceedings. For some curious and inexplicable reason, the 1st defendant's

policy of insurance was apparently not produced and put in evidence in the course of these proceedings. It would seem, however, that it was either an owner-driver policy or a policy restricted to the use of the car by a named person or persons. In consequence the 2nd defendant was not covered by any third party risks insurance at the time of the accident and the unfortunate plaintiff was left to recover such damages as he might by suing the defendants in the knowledge that if he succeeded the defendants, or either of them, would have to pay such damages personally without recourse to any Insurance Company. Whatever criminal responsibility might attach to the 1st defendant for permitting his car to be used when there was not in force in relation to its user a valid policy of insurance in respect of third party risks, it was apparent from the outset of the case that if the plaintiff was to succeed in his civil claim for damages as against the 1st defendant on the basis of vicarious liability for negligence, it was essential for him to establish that the 2nd defendant was driving the car at the material time as the servant or agent of the 1st defendant.

On the evidence before him the learned trial Judge held that the arrangement between the parties was not a simple bailment or delivery of the car by the 1st defendant to his brother-in-law for the use of the 2nd defendant but that it was — and I quote from the judgment itself — "either an express agency or a placing of the car at the disposal of the 2nd defendant". He appears to have arrived at this conclusion for the following reasons :—

First, that if the transaction between the 1st defendant and his brother-in-law had been a gratuitous bailment or loan there would have been no need to get the 1st defendant's consent or approval for the 2nd defendant to take the car. The learned trial Judge said :—

"The bailment to D.W.2 (i.e. the brother-in-law) would enable him to lend the car to the 2nd defendant without consent. The fact that such consent was necessary is, to my mind, clear evidence that there was no intention on the part of the 1st defendant to abandon his right to control of the car, but rather the intention to maintain the right of control.

Secondly, the learned trial Judge took the view that the evidence given by the 1st defendant in cross-examination was to the effect that he had pointed out to his brother-in-law the whereabouts in the car of the certificate required under the third party insurance regulations and that the brother-in-law had passed this information to the 2nd defendant could — again, to use the learned trial Judge's own words — have no possible application to bailment as understood generally, but could be accounted for only if the relationship was either (a) of agency or (b) as stated in *Halsbury* 'placing at the disposal'.

Thirdly, the learned trial Judge apparently drew an inference of agency from the question which he himself put to the 1st defendant: "Were you not giving the third person authority to drive your car for 10 days?" and the recorded answer of the 1st defendant: "That is so."

Fourthly, it would appear that after the accident the plaintiff's solicitors contended that the 1st defendant was either the principal or the master of the driver of the car and they inquired from him whether he admitted liability. The 1st defendant requested the plaintiff's solicitors to contact his insurance company and discuss the matter with them. In dealing with this point the learned Judge said :—

"I do not consider this in itself important, but taken in connection with these other matters it seems to me to exclude any question of bailment, because if there was bailment the Insurance Policy did not cover the accident."

Fifthly and lastly, the learned trial Judge appears to have drawn an inference adverse to the 1st defendant and in support of his view that there was a relationship of principal and agent between the defendants from the fact that in his statement of defence the 1st defendant that he "has no knowledge and does not admit that the 2nd defendant was at the material time in possession and/or control of motor-car AA.5026 and calls for strict proof thereof."

For myself, and with the greatest respect to the learned trial Judge, I am wholly unable to understand or appreciate how any of the points relied upon by him, whether considered individually or in the aggregate, can be said to establish that at the time of the accident the 2nd defendant was driving the car as the agent, whether express or implied, of the 1st defendant. Upon the evidence before the trial Court the transaction between the parties was, in my view, a gratuitous bailment or loan of the car by the 1st defendant to his brother-in-law with the knowledge that the car was to be lent to the 2nd defendant for his use for a period of 10 days. I am unable to agree with the reasoning of the learned trial Judge that the mere fact that the brother-in-law informed the 1st defendant that his object in borrowing the car was to lend it to the 2nd defendant and that the 1st defendant consented or approved of such a loan provided clear evidence — as the learned trial Judge found — that there was no intention on the part of the 1st defendant to abandon his right to control of the car. On the contrary, although the 1st defendant had an undisputed right at any time to require the car to be returned to him, during the subsisting period of the loan while the car was in the actual physical possession of the 2nd defendant the 1st defendant had clearly abandoned his power of dominion and right of control over the car. It is clear from the judgment of Lord Atkinson in *Samson* v. *Aitchison*[6], to which I will later refer, that the "right of control" means the right to control the way in which the car is being driven.

The fact that the 1st defendant, through his brother-in-law, had given the 2nd defendant authority to drive the car for 10 days does not, in my view, carry the matter any further in seeking to establish the relationship of principal and agent. Such authority was entirely consistent with the evidence that the arrangement was a gratuitous bailment of the car by the 1st defendant to his brother-in-law with permission to lend it to the 2nd defendant. As Bennett J. pointed out in the course of the argument in *Hewitt* v. *Bonvin*[4], to which I will later refer, "A driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to use the chattel is not evidence

of agency". Nor am I able to appreciate how the fact that the 1st defendant when handing over the car to his brother-in-law intimated to him where the third party policy of insurance was kept, or the subsequent fact that after the accident the 1st defendant informed the plaintiff's solicitors to get in touch with his Insurance Company can in any way be said — as the learned trial Judge stated — "to exclude any question of bailment" and support his conclusion that the relationship between the defendants was one of principal and agent. It is, as far as I am aware, a normal and proper practice — encouraged, if not insisted upon by Insurance Companies — for the assured, after a motor-car accident involving a claim for damages, to make no admission of liability, but simply to refer the claim to the assured's Insurance Company. That is precisely what the 1st defendant appears to have done in this case. The fact that the Insurance Company might repudiate liability at a later stage in so far as the assured was concerned, on the ground that the terms of the policy did not cover the entrustment of the car to a third party (i.e. the 2nd defendant), appears to me irrelevant for the purpose of considering the conduct of the 1st defendant at that time in referring the plaintiff's solicitors to his Insurance Company in the first instance. He may well have thought that the Insurance Company would meet the claim or he may simply have been playing for time, or he may simply have acted in what he deemed to be the correct manner. Finally, the learned trial Judge appears to have drawn an inference adverse to the 1st defendant and in favour of the relationship of principal and agent from the 1st defendant's written pleading that he had no knowledge, and did not admit, that the 2nd defendant was in possession of his car at the time of the accident and put the plaintiff to the strict proof thereof. I can see no grounds for drawing any such adverse inference. The pleading was no doubt drafted by Counsel and the paragraph adverted to was a general traverse in common form of the plaintiff's allegation of fact. Whilst it was true that the evidence subsequently established that the 1st defendant had admittedly lent his car to his brother-in-law with the knowledge that it was to be lent to the 2nd defendant, the 1st defendant was perfectly entitled to deny knowledge that at the material time of the accident the car was in the possession and control of the 2nd defendant, and was entitled to call for strict proof thereof. I am unable to appreciate how the 1st defendant's pleading could be said to negative a gratuitous bailment of the motor-car and support any finding that the relationship between the two defendants was that of principal and agent.

In dealing with the law applicable to the facts, the learned trial Judge, after referring to and seeking to distinguish a number of decided cases, sought to base his decision on his interpretation of certain passages to be found in *Halsbury's* Laws of England, 3rd edition, Volume 2, page 145, paragraph 274. It is, I think, desirable to cite those passages in full.

> "274. *Liability of bailee and bailor to third person.* The bailee alone is responsible to third parties for any injury which they may sustain by reason of his negligence or other wrongful act in the control or management of the chattel, for he is not the agent of the bailor in this connexion.
>
> On the other hand, if the owner of a chattel, though he places it at the disposal of someone else, retains control over it by himself or his servants, so that there is no bailment, he remains responsible to third parties for any damage caused by negligence in its management.
>
> Whether there is a bailment or not is a question which must depend upon the particular circumstances of the case."

It is, I think, correct to say that it is upon his construction and interpretation of the second of those passages that the learned trial Judge has largely based his decision. Apart from the express finding of the relationship of principal and agent existing between the 1st and 2nd defendants, he appears to have formed the conclusion that there was no bailment in this case because although the 1st defendant had placed the car at the disposal of someone else he had — in the words of the passage cited in *Halsbury* — "retained control over it by himself . . ." The learned trial Judge as the result of the question asked by him of the 1st defendant: "Were you not giving that third person (i.e. the 2nd defendant) authority to drive your car for 10 days?" and the affirmative reply to that question, clearly took the view that the 1st defendant still retained control over the vehicle and there was, therefore, no true bailment. He said :—

> "It is bailment only if exclusive control and the right to control had been abandoned. It is not sufficient to give anything less than an exclusive control, a control to the exclusion of the owner's control."

With respect to the learned trial Judge the conclusion that he sought to draw from the answer to his question that the 1st defendant had given authority to the 2nd defendant to make use of the car for 10 days as not constituting a bailment was wrong in law and based upon a faulty appreciation by him of the passage quoted from *Halsbury*. A consideration of every single case cited in support of the general proposition in *Halsbury* shows that in every case the owner of the motor-car retained possession and right of control either by his actual physical presence in the car at the material time or by the presence in his car of his servant or agent or, as in the last case cited (*Ormrod* v. *Crosville Motor Services Ltd.*[5]) by the existence of an agreement disclosing that the driver was driving the car at the request of, or for the purpose of, the owner.

In *Reichardt* v. *Shard*[7] the defendant, the owner of a motor-car, retained control over the driver, his son, by the fact that he never allowed his son to use the car unless accompanied by the defendant's own chauffeur. An accident occurred while the car was being driven by the son with the defendant's chauffeur sitting beside

him. In an action for damages the County Court Judge directed the jury that the defendant had not parted with the control of the car and that the defendant was responsible in law for his son's negligent driving. The Divisional Court, and finally the Court of Appeal, upheld the direction of the County Court Judge and dismissed the appeal.

In *Samson* v. *Aitchison*[6] (a New Zealand case) an accident occurred while the owner of the car, himself present in the car, was being driven by a third party. The injured person sued the owner of the car for damages for personal injuries occasioned by the driver of the car. The learned trial Judge, on the facts, gave judgment for the injured party, a decision which was confirmed by a majority decision of the New Zealand Court of Appeal. That decision was again affirmed on appeal to the Privy Council. In the course of a judgment which Their Lordships of the Privy Council stated as laying down the law with perfect accuracy, the learned trial Judge said :—

"I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happens to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this', or 'Don't do that'. The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally.: *Du Cros* v *Lambourne* [8]. The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control."

He then went on to say — and the passage seems to me most relevant when considering the facts of the present appeal :—

"No doubt if the actual possession of the equipage has been given by the owner to a third person — that is to say, if there has been a bailment by the owner to a third person — the owner has given up his right of control."

Pratt v. *Patrick*[9], again, was a case in which the owner of the car was inside it at the time when an accident occurred while the car was being driven by a friend. In an action for damages brought against the owner of the car the learned trial Judge (Acton J. as he then was), following the decision in *Samson* v. *Aitchison*, held — and I quote the headnote of the case :—

"As the defendant was in the car, and there was no evidence that he had abandoned his right of control, he was liable notwithstanding that by a casual delegation he had entrusted its actual management and mechanical control to E."

In all these cases judgment against the owner of the motor-car proceeded on the basis that although the owner of the car had temporarily placed it at the disposal of someone else he was deemed to have retained the right of control over it, in the first case by the actual presence of his chauffeur as his servant, and in the next two cases by the presence of the owner himself. The case of *Ormrod* v. *Crosville Motor Services Ltd. & Anor.* (Murphie, third party) proceeded on a somewhat different principle. In that case by an arrangement between Ormrod and Murphie, Ormrod was to drive Murphie's car from Birkenhead to Monte Carlo. Murphie himself was driving another car to Monte Carlo as a competitor in the Monte Carlo Motor Rally. It was the intention of the parties that Murphie's car, driven by Ormrod, should arrive in Monte Carlo before the end of the Rally and that Murphie, Ormrod and Mrs. Ormrod, who was accompanying her husband, should thereafter spend a holiday together using Murphie's car for that purpose. A suit case belonging to Murphie was being carried in the car. Subject only to this arrangement the Ormrods were to make the journey to Monte Carlo in Murphie's car in their own time and manner. Shortly after the Ormrods had started off from Birkenhead in pursuance of this arrangement Murphie's car, then being driven by Ormrod, collided with an omnibus, both the Ormrods being injured and both vehicles damaged. The Ormrods sued the Motor Bus Services for damages for personal injuries alleging that the accident was due to the negligent driving of the motor bus. The defendants counterclaimed in respect of the damage done to their motor bus alleging that the accident was due to the negligent driving of the motor-car by Ormrod. They also took third party proceedings against Murphie on the ground that he was vicariously liable for Ormrod's negligent driving. The learned trial Judge (Devlin J. as he then was) found, first, that the accident was due to the negligent driving of Ormrod and, secondly, that Murphie, as the owner of the car, was vicariously liable for such negligence. In arriving at that conclusion the trial Judge said :—

"It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motor-car for the negligence of the driver to whom it has been lent, but I do not think that it is necessary to show a legal contract of agency. It is in an area between the two that this case is to be found, and it may be described as a case where, in the words of Du Parcq L.J. there is a 'social or moral' obligation to drive the owner's car. Mr. Ormrod was under such a duty as this, because, if he had not driven the car as arranged, the third party would have had a legitimate grievance. I think that the arrangement amounted to a request to Mr. Ormrod to drive the car. He who complies with such a request is the agent of the owner, since he who makes the request has an interest in its being complied with. In this case the car was wanted for the purpose of a joint holiday. That was enough to give the third party an interest in the arrival of the car, so that the driving of the car became an act done for his benefit. In the case of mere permission, the person permitting has no interest in whether the act is done or not."

Murphie appealed against that judgment to the Court of Appeal. That Court, however, unanimously upheld the judgment of the trial Judge and dismissed the appeal. In the course of his judgment Singleton L.J. stated (at page 754) :—

"It has been said more than once that a driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner of the car to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be used for the joint purposes of the male plaintiff and third party when it reached Monte Carlo. In those circumstances it appears to me that the judgment of Devlin J. that at the time of the accident the male plaintiff was the agent of the third party was right, and the third party's appeal on that head should be dismissed."

Denning L.J. (as he then was) said :—

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

Again, at a later stage in the course of his judgment he said :—

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: See *Hewitt* v. *Bonvin* (4).

In the course of his judgment the learned trial Judge expressed disagreement with the decision of MacKinnon L.J. in *Hewitt* v. *Bonvin* and apparently took the view that the decision in that case was in conflict with the later decision in *Ormrod* v. *Crosville Motor Services Ltd.* He said :—

"If it (*Hewitt's case*) be authority, as contended in this case, for the statement that the owner of the motor-car is not liable for the negligence of his driver unless it is during the course of employment, or the driver is driving the vehicle on some business in connection with which the owner has an interest, then it is clear that, carried to its logical conclusion, the judgment in *Ormrod's case* should have been the opposite to what it was, because it is clear from the facts of that case that at the time of the accident occurring through the negligence of the driver he had ceased to be driving in the interests of the owner of the motor vehicle."

And later in his judgment he said :—

"At first it seemed to me that the two decisions of the English Court of Appeal might be reconciled on the basis that in *Hewitt's case* the Court was asked to infer agency from the facts, whereas in *Ormrod's case* it was clear that there was an express agency created in favour of Murphie by the owner of the motor-car, but he deviated from a direct (pursuant to the agency) course to visit friends of his own."

With respect to the learned trial Judge, his apparent difficulty in reconciling the two judgments is due to the fact that he has misread and accordingly misrepresented the facts in *Ormrod's case.* In fact, there was no deviation from a direct (pursuant to the agency) course to visit friends of his own, nor was there any evidence or finding of fact that at the time of the accident Ormrod had ceased to be driving in the interests of the owner of the motor vehicle. On the contrary, at the time the accident happened the driver was taking the direct route from his home, as arranged, to the coast in order that the car might be taken across to France. It is true that in order to visit friends en route Ormrod had started 2 or 3 days earlier than he would have done if he had been going solely for the owner's purpose. But Denning L.J. in the course of his judgment, expressly dissented from the contention put forward on behalf of Murphie that that fact should exempt the owner from liability for the driver's negligence since the accident might never have happened if he had started later. Denning L.J. said that the trip to Monte Carlo must be considered as a whole, including the proposed excursion to Normandy, and as such it was undertaken with the owner's consent for the purposes of both of them, and the owner was liable for any negligence of the driver in the course of it. It was a trip undertaken for a purpose in which the owner had an interest or concern. Denning L.J. expressly referred to and clearly accepted the decision in *Hewitt* v. *Bonvin.* It would seem clear, therefore, that the difficulty which the learned trial Judge found in reconciling the two decisions was due to his inadequate appreciation of the true facts in *Ormrod's case* and that so far from the two decisions being contradictory they are, in fact, complementary to one another.

Finally, there is the authoritative decision of the Privy Council in the case of *The Trust Co. Ltd.* v. *De Silva* (10). In that case the appellants, an Insurance Company in Ceylon, transacted some of its business through canvassers, who were paid a commission but received no salary. It also employed "field officers", who were paid a small salary and an overriding commission, and whose duty it was to supervise and control the canvassers. It was left to the canvasser or field officer to select the Doctor who would examine proposers for life insurance. The respondent, Dr. De Silva, went for that purpose in a motor-car belonging to a field officer but subject to a hire purchase agreement with the appellant Co. Travelling in the car were the respondent doctor, the canvasser, and the field officer. As the result of an accident due to the negligent driving of the canvasser, the doctor was injured, and he claimed damages from the appellant Co. It was held — and I quote from the headnote of the case :—

"That the field officer was a servant of the appellant Co. and that in making the journey in the car which had been supplied to him for the purpose of carrying out his duties he was acting in the course of and for the purposes of his employment. He was in control of the car — though not actually driving — and was liable for the negligence of the canvasser since the latter was a person over whom he had a right to exercise control. The field officer was exercising control over the car as a servant of the appellant Co. and on its behalf, and any

consequential liability attaching to him was a liability of the Co."

It will be seen, therefore, that in all these cases where injury was caused to the person or property of a third party as the result of the negligent driving of a motor-car driven by a person other than the owner, vicarious liability was held to attach to the owner only by reason of the fact that he was physically present in the car at the time and, therefore, deemed to retain the right of dominion and control, (see *Samson* v. *Aitchison* and *Pratt* v. *Patrick*), or that he retained control through his servant who was present in the car (see *Reichardt* v. *Shard* and *The Trust Co. Ltd.* v. *De Silva*), or that the car was being driven by the person at the request of the owner in pursuance of what Du Parcq L.J. in *Hewitt* v. *Bonvin* described, and Devlin J. in *Ormrod & Anor. v. Crosville Motor Services Ltd.* adopted, as "a social and moral obligation to drive the car". In the case under consideration in this appeal there was no evidence that the 1st defendant had in any way reserved the right of control over the motor vehicle to himself or that the 2nd defendant was acting as his servant or agent.

The learned trial Judge sought to find some support for his decision in this case in the authority of *Parker* v. *Miller*[11]. The facts of that case were, unfortunately, not fully reported, but it would appear that an owner who frequently allowed a friend to drive his car, got out, on one occasion and permitted or requested the friend to drive himself and his daughter home. The friend's house was in a street with a very steep gradient. The friend left the car in this street outside his home. An hour later the car started down the hill and crashed into the plaintiff's house. The County Court Judge found that the friend was negligent and that the car owner was vicariously responsible for his friend's negligence. On appeal, the judgment of the County Court Judge, although reversed in the first instance by a Divisional Court, was finally upheld and restored by the Court of Appeal. It is perhaps pertinent to observe that Aitken J in the case of *Raja Singh* v *Chin Fatt*[12] pointed out that the decision in that case had been the subject of considerable criticism in current legal literature and he declined to follow it on the ground, first, that it should be confined strictly to its own special facts until the position was further elucidated by decisions of the same or a superior Court and, secondly, that it was at variance with the decision of the Privy Council in *Samson* v. *Aitchison*, *supra* which was of binding effect upon him. But the decision in *Parker* v. *Miller* was explained by Du Parcq L.J. in the case of *Hewitt* v. *Bonvin*, *supra* on the basis that the learned County Court Judge, whose decision on questions of fact was not open to review, must have drawn the inference that the defendant had delegated the task of conveying the female passenger to her destination and looking after the car to his friend, who was, therefore, in charge as his agent, and not merely as a bailee. If the view taken by so eminent and distinguished a jurist as Du Parcq L.J. as to the true *ratio decidendi* in *Parker's case* be the correct view — and I am not so presumptuous as to take a different view — then it clearly followed that the defendant Miller, expressly or by implication, delegated to his friend the task of driving the female passenger to her destination. Miller retained control over the car through his agent and the question of bailment did not arise. When the decision in *Parker* v. *Miller* is considered in the light of the explanation given to it by Du Parcq L.J. it fully supports the passage referred to in Halsbury that if the owner of a chattel e.g. a motor car, places it at the disposal of someone else but retains control over it by himself or his servants (or agents), there is no bailment and he remains responsible to the third parties for any damage caused by negligence in its management. But in the case now under consideration, upon the facts as accepted by the learned trial Judge there were, in my view, no grounds in law for holding that there was a relationship of principal and agent, whether express or by implication, between the 1st and 2nd defendants, nor were there any grounds upon which the defendant retained control over the motor-car learned trial Judge could hold that the 1st while it was in the possession of the 2nd defendant.

In my view, the facts as found disclosed that the 1st defendant had lent the car to a third person to be used for purposes in which the owner had no interest or concern. Upon the clear authority of *Hewitt* v. *Bonvin*, approved by the Court of Appeal in *Ormrod & Anor.* v. *Crosville Motor Services Ltd.* (see the judgment of Denning L.J.) during the subsistence of that gratuitous bailment the 1st defendant had abandoned his right to control the manner in which or, indeed, the purpose for which, the car was driven and he was accordingly not responsible in law for any act of negligent driving by a third party during the period of the bailment.

There is one last matter to which I need only briefly refer. The plaintiff, by his pleadings, contended that the 1st defendant, as the owner of the motor car, was in breach of a statutory duty in permitting the 2nd defendant to drive the car whilst uninsured, and that the 2nd defendant, not having the means to meet a third party claim for damages, the owner was liable for the damages sustained by the third party. As the learned trial Judge pointed out, in order to succeed in that part of the claim the plaintiff had to bring himself within the provisions of *Monk* v. *Warbey & Ors.*[13]. The learned trial Judge found as a fact that the evidence before him was not sufficient to enable him to draw the inference that the 2nd defendant

would be financially unable to meet the quantum of damages assessed and ordered to be paid and he accordingly dismissed this limb of the plaintiff's claim. A Notice of Cross Appeal was entered by the plaintiff against this finding, but at the commencement of the hearing of this appeal Mr. Smith, on behalf of the plaintiff, stated that he was not proceeding with this Cross Appeal. It is, therefore, unnecessary to consider this matter further.

It was for these reasons that I was of the opinion that this appeal should be allowed with costs both here and in the Court below.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Sault, Keith Sellar & Co.*

ABDUL RAZAK v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) December 16, 1960]

[K.L. — Selangor Criminal Appeal No. 68 of 1960]

Criminal Law and Procedure — Possession of property reasonably suspected of having been stolen — Minor Offences Ordinance, 1955, s.29(1) — Possession of transistor radio and silver paper knife — Failure to produce document of title.

In this case the appellant after being questioned by the Police led a Police Officer to a house from where he brought out a "National" transistor radio and a silver paper-knife which he handed to the Police Officer. He said that he got these things from a friend, but who was unable to produce any document of title. On this he was arrested, charged, and sentenced to three months' imprisonment.

Held: the appellant was wrongly convicted. There was nothing inherently suspicious in being in possession of a transitor radio nor was there anything inherently suspicious in being in possession of a silver paper-knife.

Cases referred to:—

(1) *Munusamy* v. *Public Prosecutor* [1937] M.L.J. 93, 94; [1936] F.M.S.L.R. 194, 196.

(2) *Kuan Hing Wah* v. *Public Prosecutor* [1960] M.L.J. 193.

CRIMINAL APPEAL.

K. Chelvanayagam for the appellant.

Raja Abdul Aziz (Deputy Public Prosecutor) for respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted in the Magistrate's Court at Kuala Lumpur for possession of property reasonably suspected of having been stolen in contravention of section 29(1) of the Minor Offences Ordinance, 1955. He was sentenced to three months imprisonment.

The facts are that in circumstances which do not appear in evidence the appellant was being questioned by the Police at Circular Road Police Station. He then led a Police officer to a house at a certain address. The appellant entered the house. Shortly afterwards he came out with a "National" transistor radio and a silver paper-knife which were handed to the Police officer. He said that he got these things from a friend called Mahayuddin but who was unable to produce any document of title. On this he was arrested. That was the prosecution case.

The material portions of section 29(1) of the Minor Offences Ordinance read as follows :—

"Any person who has in his possession..... anything which may be reasonably suspected of being stolen.....shall, if he fails to account satisfactorily how he came by the same, be liable to..... imprisonment."

In the present case in my opinion the appellant was wrongly convicted.

In the case of *Munusamy* v. *Public Prosecutor*(1) it was said by Terrell Ag. C.J., with reference to the corresponding section of the previous Minor Offences Enactment, which in terms was the same :—

"It is for the Court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable."

I dealt with the matter myself recently in the (1960) M.L.J. 193 case of *Kuan Hing Wah* v. *Public Prosecutor*(2). What I said there was this :—

"Before a conviction can be made out under section 29(1) it must be proved in the first place that the property in possession of which the accused person is found is something 'which may be reasonably suspected of being stolen'. That suspicion may, of course, attach to the property in a number of ways. It may arise from the nature of the property, as where a beggar is found in possession of a diamond ring. It may arise from the behaviour of the accused person, as where he runs away when approached by a Police Officer. There must, however, be something in the circumstances which gives reasonable ground for suspicion."

In the present case there was nothing of the sort. There is nothing inherently suspicious in being in possession of what is called a transistor radio nor is there anything inherently suspicious in being in possession of a silver paper-knife. There is no suggestion that these articles had in fact been stolen from anywhere. There was nothing inherently suspicious about the property nor was there anything inherently suspicious about the behaviour of the appellant.

In the circumstances the appeal is allowed and the conviction quashed.

Appeal allowed.

KHOON CHYE HIN v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Ong and Ismail Khan JJ.) February 6, 1961]

[Ipoh — F.M. Criminal Appeal No. 21 of 1960]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Evidence of unreliable witness — Rejection of testimony — Misdirection.

The appellant was convicted for murder under section 302 of the Penal Code. During the trial a witness for the defence in cross-examination contradicted his own evidence in chief. With regard to this the learned trial Judge directed the jury thus: "If, Gentlemen, you consider that they were two deliberate contradictions, then you reject the whole of the evidence of that witness. On the other hand, if you think he was nervous and made a genuine mistake, then his credit still stands. It is